

**REMEDIAL ORDERS:
A SUMMARY OF THE DO's, THE DON'Ts, AND THE MAYBE's**

Hearing Officer Training – N.Y.
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I. INTRODUCTION

- A. The decision is the dispositive determination of the issue(s) raised in the due process complaint.
- B. A primary purpose of decision writing is to inform the parties how and why a decision has been made and of all that should happen after it is issued.
- C. Good decision writing will result in a simple, concise and comprehensible order that precisely defines for the parties the next steps, if any, to be taken and by when.

II. DO's

- A. The hearing officer has the authority to grant any relief s/he deems necessary, inclusive of prospective and when warranted retrospective (e.g., compensatory education) relief, to remedy any denials of a free and appropriate public education ("FAPE") and to resolve the dispute.¹

¹ See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) (IDEA empowers courts [and hearing officers] with the broad authority to fashion appropriate relief, considering equitable factors, which will effectuate the purposes of IDEA); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 52 IDELR 151, n. 11 (2009) (the remedial authority of a court under § 1415(i)(2)(C)(iii) to award reimbursement also extends to hearing officers); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203, 18 IDELR 461 (D.N.H. 1991) (finding that a hearing officer's ability to award relief must be coextensive with that of the court); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991) ("Although Part B does not address the specific remedies an impartial hearing officer may order upon a finding that a

- B. When relief is awarded, the decision must include a remedial order that is:
1. clear and specific
 2. concise, though well reasoned
 3. fitting the scope and severity of the violation(s) being remedied
 4. creative, but within legal boundaries
 5. timely in addressing the present circumstances
 6. workable and enforceable, with the use of mandatory language and discernible timelines when necessary (including the sequencing of events when appropriate)
 7. final

III. DON'Ts

- A. There are some orders that will go beyond the remedial authority of the hearing officer and must be avoided. These include:
1. ordering relief when the hearing officer has determined that the student has received a FAPE and the local educational agency (“LEA”) has complied with the procedural requirements under §§ 300.500 through 300.536²
 2. ordering relief that goes beyond the hearing officer’s subject matter jurisdiction³ or where jurisdiction has not been

child has been denied FAPE, OSEP’s position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled.”). *See also Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (discussing a hearing officer’s authority to grant compensatory education services); *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997) (relating to a hearing officer’s authority to impose financial or other penalties on local school districts, issue an order to the state educational agency who was not a party to the hearing, and invoke stay put when the issue is not raised by the parties).

² *See, e.g., Dist. of Columbia v. Pearson*, 113 LRP 6452 (D.D.C. 2013).

³ The subject matter jurisdiction of the hearing officer is limited to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child with a disability. 34 C.F.R. § 300.507(a).

otherwise established but is in question⁴

3. ordering relief that goes beyond what is necessary to address the violation(s)⁵
4. ordering systemic relief⁶
5. ordering relief based on an anticipatory violation⁷
6. issuing an opinion regarding a non-issue and ordering relief⁸
7. ordering compensatory education without an explanation on how the award was derived at by the hearing officer
8. delegating to an IEP team (or others) the hearing officer's functions (e.g., compensatory education)⁹

⁴ For example, determining whether the classroom teacher is “highly qualified (34 C.F.R. § 300.18(f)); addressing matters beyond a child find dispute for parentally placed private school children where FAPE is not at issue (34 C.F.R. § 300.140); and revocation of consent to the initial provision of special education and related services (34 C.F.R. § 300.300(b)(4)(ii)).

⁵ For example, requiring the LEA to “review and revise its special education policies and procedures to ensure that staff at the Student’s school are aware of and follow prior written notice requirements” when the hearing officer determined that the LEA failed to provide written notice of its proposal to further evaluate the student. *Dist. of Columbia Pub. Sch.*, 110 LRP 29911 (D.C. SEA 2009).

⁶ *See id.*

⁷ For example, requiring the LEA to perform on a future date some function that goes beyond what is necessary to provide the student with a FAPE in the present time. *See also Letter to Siegel*, 33 IDELR 275 (OSEP 2000) (opining that a State educational agency cannot investigate under the IDEA an allegation of a violation that “could occur”).

⁸ For example, requiring the LEA to convene a meeting to determine whether a particular placement is the least restrictive environment for a student despite placement not being an issue in the due process complaint. Another example would be requiring the LEA to correct an individualized education program (“IEP”) when the issues in the due process complaint were limited to the educational placement of the child or the location of services.

⁹ *See, e.g., Reid v. Dist. of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) (“Under the statute, the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer’s functions.”); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 47 IDELR 122 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 693, 110 LRP 48155 (2007) (holding that “neither a hearing officer nor an Appeals Board may delegate to a

9. issuing a remedial order that is not final¹⁰
10. awarding compensatory or punitive damages¹¹

IV. MAYBE's

- A. As anything else in the IDEA, there are shades of grey on what the hearing officer can order and the answer on whether it can be done is largely dependent on the facts and circumstances of each case. The Maybe's include:
 1. ordering a placement that neither party proposed.¹² The ability to do so is dependent on the record before the hearing officer.
 2. requiring the retention of consultants to work with a particular program or school. An LEA may be required to retain a consultant if the primary function of the consultant is to assist the LEA in the delivery of a FAPE directly to the student.¹³ The hearing officer should simply specify in the

child's IEP team the power to reduce or terminate a compensatory-education award"). However, once a decision has been made on whether an award is appropriate and what the "parameters" for the award should be, the hearing officer may remand to an IEP team (or others) limited decision-making authority. *See, e.g., State of Hawaii, Dept. of Educ. v. Zachary B.*, 52 IDELR 213 (D. Haw. 2009) (where the court distinguished *Reid* an upheld a hearing officer's decision to allow the private tutor and psychologist who were to provide the compensatory education the responsibility to determine the specific type of tutoring the child would receive provided that it did not exceed once weekly sessions for 15 months).

¹⁰ For example, retaining jurisdiction that extends beyond the decision timeline.

¹¹ *See, e.g., Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 45 IDELR 268 (1st Cir. 2006); *Cave v. East Meadow Union Free Sch. Dist.*, 514, F.3d 240, 49 IDELR 92 (2d Cir. 2008); *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176, 53 IDELR 139 (3d Cir. Pa. 2009); *Sellers v. School Bd. of the City of Manassas*, 141 F.3d 524, 27 IDELR 1060 (4th Cir. 1998); *J.S. v. Isle of Wight County Sch. Bd.*, 402 F.3d 468, 43 IDELR 30 (4th Cir. 2005); *Bradley v. Arkansas Dep't of Educ.*, 301 F.3d 952, 37 IDELR 181 (8th Cir. 2002); *Heidemann v. Rother*, 84 F.3d 1021, 24 IDELR 167 (8th Cir. 1996).

¹² *Letter to Eig*, 211 IDELR 174 (OSEP 1980) ("Where 'appropriate' placement is at issue, the hearing officer's scope of authority includes deciding what placement would be appropriate for the child. This scope of authority is not limited to accepting or rejecting the LEA's proposed placement.").

¹³ *See, e.g., Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006) (upholding an award of individualized instruction for the

remedial order the qualifications/expertise required and avoid identifying a specific individual/contractor.

3. requiring specific training (provided it is tied to the provision of a FAPE to the student and limited to the staff implementing the student's IEP)
4. delegating to the IEP team concurrent responsibilities (e.g., to determine placement when the placement that either party proposed at the hearing is inadequate but the record is not sufficiently developed to allow the hearing officer to make a conclusive determination on what placement would be appropriate)
5. delegating to consultants
6. enforcement of settlement agreements and prior decisions

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student's teachers that addressed the implementation of the IEP's self-help goals and objectives).